In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-689

RICHARD JOSEPH GAGNE,
PETITIONER,

v.

LARRY R. MEACHUM,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Opinion Below.

The opinion of the court below (App. A) is reported at 602 F. 2d 471 (1st Cir. 1979).

Jurisdiction.

The decision of the court below was entered on July 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Whether the charge given in the petitioner's trial for murder unconstitutionally shifted to him the burden of proving that he acted in self-defense or under provocation, in violation of the principals laid down in *In re Winship*, 397 U.S. 385 (1970), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), which was given full retroactive effect in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977).

II. Whether in a murder case, where malice is an element of the crime to be proved beyond a reasonable doubt, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), place a constitutional duty on the trial court to tell the jury affirmatively that the prosecution must assume the duty of proving that the defendant did not act with mitigation or did not act with justification when those defenses are proffered and are fairly in the case.

III. Whether, in his prosecution for murder, which took place prior to the decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the petitioner was entitled, without request and as a matter of due process, to an explanatory statement concerning the interrelationship between the inference or presumption of malice and contrary evidence of mitigation or justification so as to avoid any misapprehension by the jury with respect to the burden of proof on these issues.

Constitutional Provision Involved.

FOURTEENTH AMENDMENT.

SECTION 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The petitioner was tried before a Massachusetts Superior Court judge and jury on an indictment charging him with the deliberate, premeditated murder of one Robert J. Kowalski on October 29, 1970 (not 1969, as in the lower court's opinion, App. A, 1a). The petitioner was first tried in October, 1972, but the jury were unable to agree. A mistrial was declared and a second trial took place on February 6, 1973. At the second trial, the defendant was found guilty of murder in the second degree and was sentenced to state prison for the term of his natural life.

The petitioner filed a motion for a new trial and, in connection therewith, asked the trial judge to make certain rulings of law. This motion was denied after hearing and all but one of the requested rulings were acted upon by the judge. Under Massachusetts practice, the action of the trial judge in considering the requests for rulings of law constituted a reconsideration of any actions or directions taken by him at the trial which involved the same principles of law. A further effect of this reconsideration was to open up these same questions of law for consideration by the state appellate courts (cf. *Commonwealth* v. *Blondin*, 324 Mass. 564, 567, 87 N.E. 2d 455 (1949)). Included among the requests for rulings of law so acted upon by the trial judge was the following:

> "7. The jury is not warranted in inferring malice or in presuming malice from use of a deadly weapon and/or inferring or presuming that a wrongful act, intentionally done, is done with malice; because to do so equates intent with malice as an essential ingredient of murder. *United States v. Wharton*, 139 App. D.C. 293, 433 F. 2d 451."

The trial judge denied this request. Also included in the requests for ruling of law was the following:

"6. Where credible evidence is introduced to prove that the Defendant acted in self-defense the burden is upon the Commonwealth to prove beyond a reasonable doubt that the Defendant did not act in self-defense and that the homicide was not justified."

The trial judge allowed this request but nevertheless denied the motion for new trial. He also failed to instruct the jury in accordance with request No. 6. Ground No. 10 in the petitioner's motion for new trial contained the following allegation:

"10. The trial Court committed error in failing to charge the jury that where credible evidence is introduced that the Defendant acted in self-defense the burden is upon the Commonwealth to prove beyond a reasonable doubt that the Defendant did not act in self-defense and that the homicide was not justified."

During the pendency of the petitioner's first state court appeal, it was learned that *Mullaney* v. *Wilbur* was pending in the Supreme Court of the United States. The petitioner asked for and was granted leave to file a supplemental brief addressed to the *Mullaney* issues. This first appeal, however, was denied by the Supreme Judicial Court prior to the decision of the Supreme Court of the United States in *Mullaney*.[1] A petition for rehearing filed by the petitioner was also denied prior to the decision in *Mullaney*.

Subsequent to the decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (June 9, 1975), the petitioner filed a petition for writ of

[1] *Commonwealth* v. *Gagne*, 367 Mass. 519, 326 N.E. 2d 907 (1975) (App. D, 30a-38a).

habeas corpus in the United States District Court for the District of Massachusetts. This petition was denied (Freedman, J.) on November 10, 1976, without prejudice to the filing of a second petition for rehearing because:

1. "[A]lthough the Supreme Judicial Court was aware of the issues in *Mullaney* when it considered Gagne's petition for rehearing, it did not have the opportunity to consider those issues in light of the United States Supreme Court decision rendered more than one week later." *Gagne* v. *Meachum*, 423 F. Supp. 1177, 1181 (D. Mass. 1976); and because:

2. "Review of *Commonwealth* v. *Gagne* by the Supreme Judicial Court of Massachusetts in light of *Mullaney* also seems appropriate in view of that court's decision in *Commonwealth* v. *Rodriguez*, 1976 Mass. Adv. Sh. 1864, . . . which appears to severely undermine, if not abandon, the holding in *York*, and adopt the position taken in *Mullaney* and *Winship*." *Gagne* v. *Meachum*, *supra*, at 1181 n.2.

The petitioner thereupon filed with the Supreme Judicial Court a second petition for rehearing (ultimately a petition for writ of error) and the Supreme Judicial Court of Massachusetts rendered its decision on June 19, 1978.[2]

The petitioner then moved for a rehearing in the United States District Court on his original petition for writ of habeas corpus. The United States District Court's decision on the petitioner's motion was rendered on November 30, 1978.[3]

[2] *Gagne* v. *Commonwealth*, Mass. Adv. Sh. (1978) 1568, 377 N.E. 2d 919 (1978) (App. C, 22a-29a).

[3] *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978) (App. B, 6a-21a).

The petitioner thereafter took an appeal to the United States Court of Appeals for the First Circuit. That court's decision was rendered on July 31, 1979,[4] and its mandate was issued on August 21, 1979. The Court of Appeals held that:

> "At Gagne's trial, . . . the judge at no time stated that there was any burden on the defendant, nor was there any generally accepted state rule that required a defendant to prove self-defense. The judge stated, with significant repetition, that it was the Commonwealth's burden to prove each element of the offense beyond a reasonable doubt, that malice was an element of murder, that the Commonwealth had to prove malice, and that a killing was done with malice if it was done intentionally and 'without justification, excuse or extenuation.' The judge also defined adequate provocation and self-defense, and stated that a homicide 'may . . . be justified and hence lawful if done in self-defense.' The instruction given conveyed that the Commonwealth had to prove malice beyond a reasonable doubt, and malice was defined to include the concept that Gagne had acted without justification — *i.e.*, not in self-defense. The charge, read as a whole, *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973), did not shift the burden of proof to defendant."[5]

The court went on to hold that the petitioner was not entitled to an affirmative statement to the jury that would negate a misapprehension by them of the interrelationship between the presumption or inference of malice and the defenses of mitigation and justification.

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[4] *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir. 1979) (App. A, 1a-5a).

[5] *Id.* at 472-473 (App. A, 3a).

The issues on appeal in all of the attacks made on the petitioner's conviction, whether direct or collateral, have focused on the state court trial judge's charge to the jury and his failure properly to explain the presumption of malice and the effect upon it of contrary evidence. In each of the petitioner's prior appeals he has contended that the trial court's charge to the jury shifted to the petitioner the burden to disprove malice by requiring him to prove matters of mitigation or justification. In each of the petitioner's prior appeals, he has contended that the jury could have interpreted the trial court's charge as shifting the burden of proof on malice to him and that he was, therefore, entitled to a new trial even though it might also be that the jury could have interpreted the charge as creating only a "permissive inference."

The gravamen of the petitioner's argument is that it can never be known whether the jury drew the inference of malice freely or whether they felt compelled to do so.

The trial judge's charge to the jury is set forth in Appendix E (pp. 39a-48a). The charge is divided into two parts, an introductory part which begins in Appendix E at page 39a and ends at page 41a, and a substantive part which begins at page 41a and ends at page 48a. The transcript references set out in the charge relate to page numbers from the original trial transcript.

Reasons for Granting the Writ.

Introduction.

The petitioner argues the following reasons why this petition for writ of certiorari should be granted:

I. The decision of the Court of Appeals is in conflict with the decision of this Court in *Mullaney* v. *Wilbur*, 421 U.S.

684 (1975), and *In re Winship*, 397 U.S. 358 (1970). The Court of Appeals applied incorrect federal standards in determining whether the trial court's charge unconstitutionally shifted to the petitioner the burden of proving that he acted in self-defense or under provocation.

II. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), should be interpreted to require an affirmative instruction to the jury that the prosecution must prove beyond a reasonable doubt the absence of mitigation or self-defense once those issues have been properly presented in a homicide case; otherwise there is a definite risk that a jury will interpret instructions on the presumption of malice as conclusive or burden-shifting in violation of a defendant's right to due process.

I. The Decision of the Court of Appeals is in Conflict with the Decision of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), and In re Winship, 397 U.S. 358 (1970). The Court of Appeals Applied Incorrect Federal Standards in Determining Whether the Trial Court's Charge Unconstitutionally Shifted to the Petitioner the Burden of Proving that he Acted in Self-Defense or under Provocation.

The charge given in the petitioner's trial for murder unconstitutionally shifted to him the burden of proving that he acted in self-defense or under provocation in violation of *In re Winship*, 397 U.S. 358 (1970), and in violation of principles laid down in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), which was given full retroactive effect in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977).

The presumption of malice in cases of intentional homicide is a device that places the burden of proving justification or

mitigation on the defendant. This is necessarily so because the presumption of malice, ipso facto, presumes the non-existence of justification or mitigation. Malice cannot co-exist with either mitigation or justification.

The petitioner does not contend that the prosecution must in the very first instance introduce evidence of facts which would negate the existence of mitigation, justification or excuse. The petitioner is in complete agreement that it would be an unreasonable burden upon the prosecution to require it in every murder case to prove not only the killing of the deceased by the defendant, but also the non-existence of every conceivable set of circumstances which might be sufficient to constitute innocent homicide or manslaughter.

The gist of the petitioner's argument is that, once a jury issue is generated with respect to mitigation, justification or excuse, whether the issue arises from the prosecution's case or from evidence produced by the defendant, the presumption of malice has to be totally dissipated. Once the issue is generated with respect to mitigation or justification, not only must the state assume the burden of persuasion on those issues to disprove them, but the jury has to be told about this. When the trial judge in the petitioner's case permitted the presumption or inference of malice to remain in the case, even though issues of mitigation and justification had been properly generated, the jury not only were told that in cases of intentional homicide there is a natural presumption of malice, but they were also led to believe that in cases of intentional homicide there is a corresponding presumption that the homicide was not committed justifiably or under circumstances of mitigation. This was inevitable because the presumption of malice ipso facto presumes the non-existence of justification or mitigation. The presumption, therefore, became an artificial aid to the prosecution's burden.

The petitioner's challenge to the trial court's jury instructions clearly is grounded upon the premise that malice, because it is an essential ingredient of the crime of murder, is antithetical to and inconsistent with mitigation or justification, because both negate malice. These defenses under Massachusetts law are intrinsically related to a basic element of the prosecution's case, i.e., malice. They are not affirmative defenses in Massachusetts. Malice is not a single notion but rather an "umbrella" term encompassing three distinct aspects:

1. The act (the killing) which produces the homicide must be intentional;
2. The act (the killing) must be without justification or excuse;
3. The act (the killing) must be unmitigated. Cf. *Commonwealth* v. *Rodriguez*, 370 Mass. 684, 689-690, 352 N.E. 2d 203 (1976).

The trial judge in the petitioner's trial did not say in actual words that the petitioner had the burden of proving mitigation or self-defense, but neither did he say that the prosecution had to prove the absence of mitigation or the absence of self-defense once they were issues in the case. What the trial judge did do, however, was to tell the jury that *murder* is the natural inference to be drawn by the law from all homicides intentionally done.

The jury were told that if an act is done intentionally it is done without mitigation or excuse (Tr. 779).

The jury were told that malice *is* implied in every deliberately proven act against another (Tr. 781).

The jury were told that if the killing was intentional even though the act of killing followed the thought immediately, without justification, excuse or extenuation, the killing was with malice aforethought (Tr. 781).

The jury were then told again that "[i]f a man intentionally and without legal justification or excuse or extenuation . . . [shoots somebody or uses a force that] will probably do grievous bodily harm to that other person and will create a plain and strong likelihood that the other person would die as a result, the act is malicious" (Tr. 781-782).

The jury were then told that the condition of the mind which permits someone to do injury without excuse or justification is malice and that when the fact of malice is shown there is nothing to rebut the natural presumption of malice for the rational probability is that a man of sound mind intends the proper and natural consequences of his act (Tr. 782-783).

The jury were told by the trial judge to start with the crime of murder, because the import of the charge was that murder is the natural inference to be drawn by the law from every homicide.

The lower court held that *Mullaney* v. *Wilbur*, *supra*, requires no more than a general statement to the jury that the prosecution has the burden of proving malice beyond a reasonable doubt together with an admonition that malice negates self-defense and reasonable provocation and is an element to be proved beyond a reasonable doubt. Defining malice as negating self-defense or reasonable provocation and describing it further as an element of murder to be proved beyond a reasonable doubt sheds no light whatsoever on the manner in which the presumption or inference of malice will be perceived by the jury. This is so because the jury could very well find malice on the basis of the presumption and also find that self-defense and reasonable provocation did not exist solely because they were led to believe they did not exist because of the same presumption or inference of malice. A jury could very well believe beyond a reasonable doubt that a defendant had committed an intentional homicide with a dangerous weapon and at the same time have a reasonable doubt as to whether

the defendant acted under mitigating circumstances or in self-defense. Yet, under the decision of the lower court, they could nevertheless find malice beyond a reasonable doubt because the trial judge told them they could infer or presume its existence from the fact of the intentional homicide with a dangerous weapon.

II. Mullaney v. Wilbur, 421 U.S. 684 (1975), Should be Interpreted to Require an Affirmative Instruction to the Jury that the Prosecution Must Prove Beyond a Reasonable Doubt the Absence of Mitigation or Self-Defense Once those Issues have been Properly Presented in a Homicide Case; Otherwise there is a Definite Risk that a Jury will Interpret Instructions on the Presumption of Malice as Conclusive or Burden-Shifting in Violation of a Defendant's Right to Due Process.

A. *Mullaney v. Wilbur Should be Interpreted to Require that an Affirmative Statement be Given to the Jury to the Effect that the Prosecution Must Disprove Mitigation or Self-Defense Once they are Issues in the Case.*[6]

It is true that *Mullaney* dealt with an instruction that expressly placed on the defendant the burden of proving mitigation by a preponderance of the evidence. In *Mullaney* this Court said:

> "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney* v. *Wilbur*, 421 U.S. at 704.

[6] Assuming that self-defense is not an affirmative defense. It is not an affirmative defense under Massachusetts law. Cf. *Commonwealth* v. *Rodriguez*, 370 Mass. 687-688 and n.4, 352 N.E. 2d 203 (1976); *Commonwealth* v. *Stokes*, Mass. Adv. Sh. (1978) 610, 621-622, 374 N.E. 2d 87 (1978).

Whether this clear and distinct holding also requires that an affirmative statement be given to the jury is an extremely important issue. If *Mullaney* makes it a matter of due process that the state bear the burden of proof on the issue of the absence of mitigation or self-defense, it would seem natural that a jury must be told about this if they are to perform their function in accordance with due process. Only in this way can the court be sure that there will be no misapprehension on the part of the jury.

The Commonwealth of Massachusetts has held that the absence of mitigation and the absence of self-defense are *Winship*-type facts with respect to proof of malice. Cf. *Commonwealth* v. *Rodriguez*, 370 Mass. 684, 689, 352 N.E. 2d 203 (1976); *Commonwealth* v. *Stokes*, Mass. Adv. Sh. (1978) 610, 622, 374 N.E. 2d 87 (1978).

When mitigating factors or self-defense become issues in a homicide case, however, they usually come into the case as if they were affirmative defenses. More often than not, the defendant is the source of the evidence which raises the issue of mitigation or self-defense. It is not only natural but probably predictable that a jury would perceive the burden of proof to be on the party having the affirmative on these issues. Only an affirmative instruction by the trial court can dissipate the confusion attendent to the subtle question whether the prosecution actually is perceived to have assumed the burden to disprove facts — to prove the absence of facts — when evidence bearing on those issues is introduced into a case. This is especially so if such facts are introduced in the same way as if they were affirmative defenses.

The petitioner submits to the Court that the lower court utilized an improper standard in determining whether the petitioner was entitled to an affirmative statement to the jury that the prosecution was required to prove beyond a reasonable doubt the absence of mitigating circumstances and the absence of self-defense after those issues were properly brought into the petitioner's case. The lower court held that the charge did not shift to the petitioner the burden of proof on the element of malice. The court then concluded that, because this burden was not shifted, there was no requirement for an affirmative statement to the jury concerning the allocation of the burden of proof. Indeed, the court held that

> "Implicit in our conclusion is our agreement with the district court that the charge did not raise an impermissible presumption of malice, and thus did not lessen the state's burden of proving malice beyond a reasonable doubt." *Gagne* v. *Meachum*, 602 F. 2d at 473 (App. A, 4a).

The petitioner suggests that the proper test to be applied should be based on whether a defendant in a homicide case has proffered evidence of mitigation or justification and whether those issues are properly presented in the case. If so, the petitioner submits that *Mullaney* requires an affirmative statement to the jury explaining that the prosecution's burden of proving malice beyond a reasonable doubt includes the duty of proving the absence of mitigating factors or self-defense. It is the relationship between the presumption or inference of malice on the one hand and contrary evidence of mitigation or self-defense on the other hand that creates the potential for misapprehension on the part of the jury. The jury in the petitioner's case could very well have relied on the court's instruc-

tion that malice could be inferred from an intentional homicide committed with a dangerous weapon as their reason for eliminating mitigation or self-defense from the case. Whether they did this can never be known. It is the distinct possibility that they did, however, that strips the petitioner's conviction of its integrity. It hardly seems possible that the jury in the petitioner's case were aware of the subtle difference between the burden of proof and the burden of going forward. They could only know about such concepts if they were told about them by the trial judge.

In sum, the petitioner contends that the lower court was in no better position to know how the jury perceived the charge than a seer. The question should be whether the charge had the capacity or propensity to confuse. Could the jury have felt compelled to find malice from the fact of an intentional killing with a dangerous weapon; could the jury have reasonably felt that the petitioner bore the burden of establishing mitigation or self-defense? If a fair reading of the charge permits the latter perception, the instruction violates due process. *Sandstrom* v. *Montana*, ____ U.S. ____, 61 L. Ed. 2d 39, 46-48, 51 (1979).

B. *As a Matter of Due Process the Defendant was Entitled to an Explanatory Statement Concerning the Interrelationship Between the Inference or Presumption of Malice and Contrary Evidence of Mitigation or Justification so as to Avoid Any Misapprehension by the Jury with Respect to the Burden of Proof on these Issues.*

In *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), this Honorable Court held that *Mullaney* v. *Wilbur, supra*, was fully retroactive. Relying on *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972), this Court said: "'"[w]here the *major* purpose of new constitutional doctrine is to overcome an aspect of

the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect."'" 432 U.S. at 243 (407 U.S. at 204). (Emphasis added in *Hankerson*.) "The reasonable-doubt standard of proof is as 'substantial' a requirement under *Mullaney* as it was in *Winship*." 432 U.S. at 243-244.

This Court also said in *Patterson* v. *New York*, 432 U.S. 197, 215 (1977):

> "*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

In Massachusetts, self-defense and mitigation are not affirmative defenses; they are matters which must be proved not to exist once the issue of their existence is properly brought in a case. *Commonwealth* v. *Rodriguez*, 370 Mass. 684, 688, 352 N.E. 2d 203 (1976). *Commonwealth* v. *Stokes*, Mass. Adv. Sh. (1978) 610, 622, 374 N.E. 2d 87 (1978).

What happens, then, to such issues as mitigation or self-defense, which are normally introduced into a case in the nature of affirmative defenses by the defendant, is wholly dependent on whether their relationship to the element of malice is properly explained to the jury. In *Commonwealth* v. *Rodriguez*, the Supreme Judicial Court clearly held that it had always

been the law of Massachusetts that malice was a tripartite concept consisting of:

1. an intentional killing,
2. that was committed without mitigating circumstances, and
3. without justifiable circumstances such as self-defense.

The lower court held that a general statement concerning the burden of proof was sufficient without requiring an affirmative statement by the trial judge that, when mitigation or justification were genuine issues in the case, their absence had to be proved beyond a reasonable doubt by the prosecution. The petitioner submits that unless a trial judge explains to a jury the difference between proving the positive aspect of malice, i.e., intentional killing, and proving the negative aspects of malice, i.e., the absence of mitigation and the absence of self-defense, there is definite risk that the jury will be confused.

It has been said that a right without a remedy is no right at all. The defendant submits that if *Mullaney* requires proof beyond a reasonable doubt of all elements constituting the crime charged, it further requires that juries be instructed in plain language that creates no risk of misapprehension on their part. The jury should know that the prosecution has *all* of the burden when proof of an element of a crime involves proof of affirmative factors and disproof of negative factors.

The principle of full retroactivity means that a defendant is deemed entitled to have had at his trial the benefit of any factor without which factor the truth-finding function of his trial would have been substantially impaired. *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972). *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977).

The reasonable doubt standard of proof is as substantial a requirement under *Mullaney* as it was in *Winship*. *Hankerson* v. *North Carolina*, 432 U.S. at 243-244.

The petitioner contends that the instructions given by the trial judge were fraught with the potential for confusing the jury because they treated the burden of proof only generally, under circumstances where positive factors and negative factors were intertwined in the definition of malice.

The petitioner, therefore, urges this Court to interpret and expand *Mullaney* as requiring some explanatory statement that would reasonably prevent a misapprehension on the part of the jurors with respect to the positive and negative factors that make up the element of malice in a homicide case.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 79-1023

RICHARD JOSEPH GAGNE,
PETITIONER, APPELLANT,
v.
LARRY R. MEACHUM,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before
CAMPBELL and BOWNES, *Circuit Judges*,
and DEVINE,* *District Judge*.

William K. Danaher, Jr., for appellant.
John T. McDonough, Assistant District Attorney, with whom *Matthew J. Ryan, Jr.*, District Attorney, Hampden District, was on brief, for appellee.

July 31, 1979

CAMPBELL, *Circuit Judge*. Richard J. Gagne, who is a Massachusetts state prisoner serving a life sentence for second degree murder, seeks a writ of habeas corpus. We deny petitioner's request for many of the same reasons given by the court below, *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978).

Gagne was tried and convicted before a Massachusetts Superior Court judge and jury in February 1973, admittedly having shot and killed one Robert Kowalski in Gagne's Pharmacy in Holyoke on October 29, 1969. Gagne's explanation was that he discovered an intruder in the pharmacy after it had been closed for the night; that the intruder ran toward the

* Of the District of New Hampshire, sitting by designation.

door, turned and pointed a gun at him; and that he then shot at the intruder twice in self-defense. One shot hit Kowalski in the back and killed him; only later, according to Gagne, did he realize that he knew the victim. The Commonwealth's theory was that Gagne and Kowalski had met by arrangement at the pharmacy, that something had gone wrong, and that Gagne had shot the deceased. In support, it offered evidence of inconsistencies between Gagne's statement to the police and his trial testimony, of Gagne's unsuccessful efforts to help Kowalski with some problems that he was having with Provincetown authorities concerning his work as a pharmacist there, of a passing motorist having seen Gagne conversing in the pharmacy with someone of the deceased's description, and of the fact that the deceased was shot in the back. The facts, as well as the lengthy procedural history of the case, appear in greater detail in the district court's opinion, *supra*, as well as in two prior opinions of the Massachusetts Supreme Judicial Court, *Gagne* v. *Commonwealth*, __ Mass. __, 377 N.E.2d 919 (1978), and *Commonwealth* v. *Gagne*, 367 Mass. 519, 326 N.E.2d 907 (1975).

Gagne's petition is based on the allegation that the state trial judge unconstitutionally shifted to him the burden of proving that he acted in self-defense or under provocation, in violation of the principle laid down in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), which was given full retroactive effect in *Hankerson* v. *Georgia*, 432 U.S. 233 (1977).[1] Like the district court, however, we do not believe that the charge shifted to Gagne the burden of proof on the element of malice.

The Supreme Court held in *Mullaney* that an instruction that a Maine defendant was required to prove "by a fair

[1] Gagne failed to object to the instruction on these grounds, but the Massachusetts Supreme Judicial Court has held that the possibility of review was not lost. *Gagne* v. *Commonwealth*, __ Mass. __, 377 N.E.2d 919, 921 (1978); *Commonwealth* v. *Stokes*, __ Mass. __, 374 N.E.2d 87 (1978).

preponderance . . . that he acted in the heat of passion on sudden provocation" in order to reduce a homicide to manslaughter, 421 U.S. at 686, violated the defendant's right to have the requisite degree of malice, as an element of the offense, proven beyond a reasonable doubt by the state.[2] *See In re Winship*, 397 U.S. 358 (1970). At Gagne's trial, by contrast, the judge at no time stated that there was any burden on the defendant, nor was there any generally accepted state rule that required a defendant to prove self-defense. The judge stated, with significant repetition, that it was the Commonwealth's burden to prove each element of the offense beyond a reasonable doubt, that malice was an element of murder, that the Commonwealth had to prove malice, and that a killing was done with malice if it was done intentionally and "without justification, excuse or extenuation." The judge also defined adequate provocation and self-defense, and stated that a homicide "may . . . be justified and hence lawful if done in self-defense." The instruction given conveyed that the Commonwealth had to prove malice beyond a reasonable doubt, and malice was defined to include the concept that Gagne had acted without justification—*i.e.*, not in self-defense. The charge, read as a whole, *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973), did not shift the burden of proof to defendant.

[2] While *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), involved only the defense of provocation, and the Supreme Court has not actually decided whether a state may treat self-defense as an affirmative defense that it need not negative beyond a reasonable doubt, *compare Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977) with *Patterson* v. *New York*, 432 U.S. 197 (1977) (provocation may be treated as affirmative defense for defendant to prove by preponderance), respondents do not claim that self-defense in Massachusetts is not subject to the requirements of *Mullaney*. In 1978, several years after the present case was tried, the Massachusetts Supreme Judicial Court expressly ruled that the absence of self-defense was required to be proven beyond a reasonable doubt by the prosecution, *Commonwealth* v. *Stokes*, __ Mass. __, 374 N.E.2d 87, 93. The Maine courts had so held even prior to *Mullaney*, *see Mullaney*, 421 U.S. at 702.

To be sure, the court did not tell jury explicitly that the Commonwealth had to prove absence of self-defense. It was not asked to give such an instruction but, in any event, we do not perceive the natural import of the charge as indicating that the Commonwealth did not have this burden. Petitioner would have us require not only that the burden not be shifted expressly or by implication to a defendant, but that he be deemed entitled, without request and as a matter of constitutional law, to an explanatory statement negativing any possible misapprehension on the part of jurors. We think petitioner asks too much.[3]

Implicit in our conclusion is our agreement with the district court that the charge did not raise an impermissible presumption of malice, and thus did not lessen the state's burden of proving malice beyond a reasonable doubt. Gagne objects to the state court's statements that "malice is implied in every deliberately proven act against another" and that, "When the fact of malice is shown there is nothing to rebut the natural presumption of malice[,] for the rational probability is that a man of sound mind intends the probable and natural consequences of his act."[4] These statements must be read in the context of the judge's repeated assertions that murder "is the killing of a human being without legal justification or excuse and without . . . extenuating circumstances," and that a homicide is malicious, and therefore murder, if done "intentionally, *that*

[3] We reject Gagne's objection to the Massachusetts rule that, although *Mullaney* is retroactive, only instructions given after the Massachusetts Supreme Judicial Court's decision in *Commonwealth* v. *Rodriguez*, __ Mass. __, 352 N.E.2d 203 (1976), must contain instructions that the Commonwealth must prove absence of self-defense; this is not inconsistent with the constitutional standard of *Mullaney*, which disapproved an instruction explicitly placing the burden of proving provocation on the defendant. We do not think that *Mullaney* requires a new trial in every pre-*Mullaney* case in which the jury was not told explicitly that the state had to prove absence of self-defense beyond a reasonable doubt.

[4] In fairness to the state court, these statements in present form read as if somewhat garbled in transcription. We proceed on the assumption, however, that what appears in the official transcript is correct verbatim.

is without mitigation or excuse." (Emphasis added.) The court consistently equated a malicious killing amounting to murder with absence of mitigation, excuse or justification, having initially stated that a homicide in self-defense was both justified and lawful. Its single remark concerning the "natural presumption of malice"—*i.e.*, "the rational probability . . . that a man of sound mind intends the probable and natural consequences of his act"—was not set out as a legal presumption for the defendant to rebut, nor did it affect the issue of self-defense. *Cf. Sandstrom* v. *Montana*, 47 U.S.L.W. 4719 (U.S. June 18, 1979) (disapproving instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts"). Rather the court said that "*When the fact of malice is shown*," *i.e.*, when a homicide is shown to have been done intentionally, without justification or excuse, "there is nothing to rebut the natural presumption." (Emphasis added.) As the district court, 460 F. Supp. at 1219-20, and the Massachusetts Supreme Judicial Court, 377 N.E. 2d at 921-23, both found, this simply allowed the jury to make a reasonable inference of malice if it concluded that Gagne had acted intentionally and without justification or mitigation, *i.e.*, intentionally and, for present purposes, not in self-defense.[5] We cannot accept Gagne's position, that the instruction conveyed "that the law *itself* raises the inference of malice."[6] It was clear that malice was an element for the Commonwealth to prove beyond a reasonable doubt.

The judgment of the district court denying the writ of habeas corpus is affirmed.

[5] The Supreme Judicial Court has said that the inference of malice in Massachusetts is merely an inference that the jury can freely disregard. *Gagne* v. *Commonwealth*, __ Mass. __, 377 N.E.2d 919, 922-23 (1978).

[6] Gagne's efforts to equate the charge given in his case with that given in *Commonwealth* v. *York*, 9 Met. 93 (1845), and disapproved in *Mullaney*, 421 U.S. at 694-95, is misplaced. There the instruction was that when the fact of killing was proved, malice was presumed as a matter of law unless the defendant proved by a preponderance the facts of excuse or extenuation. *See id.*

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD JOSEPH GAGNE

v.

Civil Action
No. 75-4777-F

LARRY R. MEACHUM

Memorandum.

November 30, 1978.

FREEDMAN, D.J.

Richard Joseph Gagne was convicted of murder in the second degree on February 20, 1973[1] and is now serving a life sentence in a Massachusetts correctional facility. Relying on *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) ("*Mullaney*"), which was given full retroactive effect in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977) ("*Hankerson*"), Gagne seeks federal habeas corpus relief from that conviction. After considering the issues presented, I deny Gagne's petition for a writ of habeas corpus *ad subjiciendum*.

Gagne has persistently challenged the validity of his conviction. A week after the jury returned its verdict, Gagne filed a motion for a new trial which was denied by the trial judge on July 17, 1973. Gagne then appealed to the Supreme Judicial

[1] This was Gagne's second trial on the murder charge. The jury at Gagne's first trial were unable to agree on a verdict and the trial judge declared a mistrial.

Court of Massachusetts (the "SJC"). The SJC affirmed Gagne's conviction on April 28, 1975. *Commonwealth* v. *Gagne*, 367 Mass. 519, 326 N.E.2d 907 (1975). Gagne's request for a rehearing before the SJC was denied on May 28, 1975.

Gagne then filed a petition for a writ of habeas corpus in this court. Because the SJC had not been afforded an opportunity to consider Gagne's claims in light of *Mullaney*, which was decided more than a week after the SJC denied Gagne's request for a rehearing on his appeal, I denied Gagne's habeas corpus petition under the doctrine of exhaustion of state judicial remedies. *Gagne* v. *Meachum*, 423 F. Supp. 1177 (D. Mass. 1976). Gagne then filed a second petition for rehearing with the SJC. The SJC denied the petition for rehearing and suggested that Gagne file a petition for writ of error. Gagne did so. The SJC then reviewed his claims in light of *Mullaney* and its own decision in *Commonwealth* v. *Rodriguez*, ____ Mass. ____, 352 N.E.2d 203 (1976) ("*Rodriguez*"), and affirmed the conviction. *Gagne* v. *Commonwealth*, ____ Mass. ____, 377 N.E.2d 919 (1978). Gagne then revived his petition for a writ of habeas corpus by filing a motion for rehearing in this court. I allowed the motion and heard arguments on the merits of the habeas corpus petition itself, as modified by the motion for rehearing, on August 24, 1978.

For convenience, I state here without the traditional indentation the summary of the testimony given by the SJC in its decision on Gagne's initial appeal, *Commonwealth* v. *Gagne*, *supra* at ____, 326 N.E.2d at 908-909. The footnotes are mine: The defendant was a pharmacist employed in a pharmacy owned by his father. On the night of the homicide, the defendant closed the store at approximately 9:00 p.m., but remained working in the prescription area in the rear. Sometime after 10:00 p.m., the defendant heard glass break in the

front of the store. He drew his revolver,[2] went to the front to investigate and found a widow broken. He opened the door and searched the area outside but was unable to find anyone. He returned to the store and started to call the police when he heard the sound of someone running inside the pharmacy. He saw someone trying to get out the front door who then turned toward the defendant, said "son-of-a-bitch," and pointed a gun in his direction. The defendant took his revolver out of his pocket and fired two shots.[3] The victim fell and the defendant immediately called the police. The defendant was taken to the police station, where he gave a statement disclosing essentially the facts set out above.

It was subsequently revealed that the defendant had known the victim prior to the shooting and had attempted to assist him with some problems the victim was having with Provincetown authorities regarding his position as a pharmacist there. The victim had attended the pharmacy school where the defendant taught, and in fact had had the defendant as a teacher. Approximately two months before the shooting, the defendant had informed the victim that he could not help him.

In his statement to the police, the defendant was very specific as to everything he had done on the night of the shooting. However, the day after the incident, he notified police that he forgot to tell them about a telephone call from Mrs. Helen A. Simkins, with whom he was talking when he heard the glass break, and who held the line open while he made his search. Mrs. Simkins testified in the defendant's behalf.

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[2] There were apparently two guns involved in this case, Gagne's and that of the victim. The victim had obtained his gun only a few days before the homicide. *Compare Gagne* v. *Commonwealth*, *supra* at ____, 377 N.E.2d at 923 with *Commonwealth* v. *Gagne*, *supra* at ____, 326 N.E.2d at 912.

[3] Only one shot struck the victim. *See Gagne* v. *Commonwealth*, *supra* at ____, 377 N.E.2d at 923.

The defendant also had neglected to tell police in his statement about one Frederick Wasilenko, who the defendant later claimed had come into the store between 10:00 and 10:20 p.m. to purchase some items. The defendant told police about Wasilenko after the police had been informed by one William R. Roberts that he had seen the defendant and another man conversing in the store between 10:15 and 10:30 p.m. Roberts described the man he had seen in the store, and although Wasilenko, whom he had known for many years, fit the description, Roberts testified that he was certain it was not Wasilenko.

The defendant's testimony at the trial was substantially the same as his prior statement to police, except for the telephone call from Mrs. Simkins and the visit by Wasilenko. There was some inconsistency in the timing of the calls and visits, but otherwise defense witnesses corroborated the defendant's account of the night in question.

The defendant contends that he was surprised by an intruder whose identity was not known to him at the time and upon being faced with a gun he reacted in self-defense by shooting his assailant. The Commonwealth's contention was somewhat different: It contended that the defendant and the victim had a pre-arranged meeting, something went wrong, and the defendant shot and killed the victim. The case went to the jury with instructions on murder in the first degree, murder in the second degree, and manslaughter, and the jury returned a verdict of guilty of murder in the second degree.

Gagne's argument here, in essence, is that the trial judge's charge, which included instructions regarding the inference of malice, relieved the Commonwealth of its burden of proving malice beyond a reasonable doubt and placed on Gagne the burden of proving the non-existence of malice. In the words of the SJC, "[s]uch a shift of the burden of persuasion would be constitutionally impermissible." *Gagne* v. *Common-*

wealth, supra at ____, 377 N.E.2d at 921 (citing *Hankerson, supra,* and *Mullaney, supra*). Gagne also contends that the SJC, in its decision on his petition for writ of error, *Gagne* v. *Commonwealth, supra,* applied a more lenient constitutional standard than that applied to cases tried after the *Mullaney* decision and argues that the SJC decision "emasculates" *Mullaney* by examining the jury charge in its entirety rather than by determining whether the charge "in fact" placed the requisite burden on the Commonwealth. Finally, Gagne contends that the jury's verdict was against the weight of the evidence.

As I noted in my order denying Gagne's habeas corpus petition on the grounds of failure to exhaust state judicial remedies, *Gagne* v. *Meachum, supra, Mullaney* was merely an application of the constitutional principle enunciated by the Supreme Court in *In re Winship*, 397 U.S. 358 (1970) ("*Winship*"), wherein the Court said:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. at 364. In *Mullaney*, the Court applied this principle — that due process requires the prosecution to prove each element of a crime beyond a reasonable doubt — to a Maine rule requiring a defendant charged with murder to prove, by a preponderance of the evidence, the mitigating defense of "heat of passion on sudden provocation," in order to reduce the crime to manslaughter. Finding the Maine rule to be inconsistent with *Winship*, the Court said:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a lesser sentence. This is an intolerable result. . . .

421 U.S. at 703 (emphasis in original).

The broader import of *Mullaney* is that the burden of proof as to an essential element[4] of a crime may not, consistent with the Due Process Clause, be shifted to the defendant. *See Patterson* v. *New York*, 432 U.S. 197 at 215 (1977). "Malice aforethought" is an essential element of the crime of murder in the second degree in Massachusetts.[5] *See, e.g., Common-*

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[4] I note that *Winship* and *Mullaney* do not require that the prosecution prove beyond a reasonable doubt the nonexistence of all potentially mitigating factors. For example, within certain apparently unsettled constitutional limits, a state may define affirmative defenses and place on the defendant the burden of proving them. *See, e.g., Patterson* v. *New York*, 432 U.S. 197 (1977) (New York rule placing on defendant the burden of proving affirmative defense of extreme emotional disturbance does not violate the Due Process Clause); *Buzynski* v. *Oliver*, 538 F.2d 6 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976) (anticipating *Rivera* v. *Delaware*, 429 U.S. 877 (1976)).

[5] The law of homicide in Massachusetts tracks the traditional common law formulation. *See Commonwealth* v. *Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965). *See generally*, W. LaFave & A. Scott, Jr., *Criminal Law* 528-534 (1972). Murder is the unlawful killing of a human being with malice aforethought. *See* 32 *Mass. Practice* § 172 at 71 (Nolan, Criminal Law 1976); Mass. Gen. Laws ch. 277, § 39. Murder committed with premeditation, extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable by death or life imprisonment is first degree murder. All other murder is in the second degree. Mass. Gen. Laws ch. 265, § 1. Manslaughter is the unlawful killing of a human being without malice aforethought. *See, e.g., Commonwealth* v. *Beaulieu*, 333 Mass. 640, 133 N.E.2d 226 (1956), 32 *Mass. Practice, supra* § 201 at 92.

wealth v. *Scanlon*, ____ Mass. ____ at ____, 364 N.E.2d 1196 at 1200 (1977). *See also*, 32 *Mass. Practice* § 174 at 75 (Nolan, Criminal Law 1976). Under *Mullaney*, therefore, in any murder prosecution, the Commonwealth must prove the element of malice beyond a reasonable doubt and the burden of proof on the issue of malice may not be shifted to the defendant.[6] Against this background, I turn to consideration of Gagne's claims.

I consider first, and reject, Gagne's contention that the SJC "emasculate[d]" *Mullaney* by examining the jury charge as a whole rather than determining whether the trial judge "in fact" placed the requisite burden on the Commonwealth.[7]

[6] The SJC has consistently recognized that the burden of proving malice in a murder prosecution lies with the Commonwealth and that this burden may not be shifted to the defendant. *See, e.g., Commonwealth* v. *Harris*, ____ Mass. ____, 380 N.E.2d 642 (1978); *Gagne* v. *Commonwealth*, *supra*; *Commonwealth* v. *Collins*, ____ Mass. ____, 373 N.E.2d 969 (1978); *Commonwealth* v. *Stokes*, ____ Mass. ____, 374 N.E.2d 87 (1978); *Commonwealth* v. *Greene*, ____ Mass. ____, 362 N.E.2d 910 (1977); *Commonwealth* v. *Johnson*, ____ Mass. ____, 361 N.E.2d 212 (1977); *Rodriguez*, *supra*.

[7] In reviewing Gagne's *Mullaney* claims, the SJC followed the roadmap it had previously drawn in *Rodriguez* and *Commonwealth* v. *Stokes*, ____ Mass. ____, 374 N.E.2d 87 (1978). In *Rodriguez*, the SJC applied what it called the "well established proposition" that the giving or the failure to give a single instruction "must be viewed in the context of the overall charge." *Rodriguez*, *surpa* at ____, 352 N.E.2d at 207 (quoting *Cupp* v. *Naughton*, 414 U.S. 141 at 146-147 (1973)). The SJC found that the trial judge's failure to give a requested instruction that the Commonwealth must prove beyond a reasonable doubt that the defendant did not act in self-defense was error in the context of the overall charge given. The SJC specifically declined to comment on when, in the absence of a request, such a charge might be required. *Stokes* dealt with that issue.

In *Stokes* the defendant neither requested an instruction on the burden of proof on the issue of self-defense nor objected to the charge as given. Although affirming the conviction, the SJC declined to hide behind the Supreme Court's suggestion in *Hankerson* that, in cases tried before *Mullaney*, "[t]he States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a

The practice of examining the giving or the failure to give a jury instruction in the context of the charge as a whole is firmly established. *See, e.g., United States* v. *Park*, 421 U.S. 658 at 674 (1975); *Boyd* v. *United States*, 271 U.S. 104 at 107 (1926); *United States* v. *Harrigan*, No. 78-1137 (1st Cir. Nov. 14, 1978); *United States* v. *Garcia*, 562 F.2d 411 at 416 (7th Cir. 1977); *Commonwealth* v. *Leaster*, 362 Mass. 407 at 416-417, 287 N.E.2d 122 at 128 (1972). *Cf. Dunn* v. *Perrin*, 270 F.2d 21 at 25 (1st Cir.), *cert. denied*, ____ U.S. ____ (1978) (finding obfuscation of "one of the 'essentials of due process and fair treatment'" in the cumulative effect of three erroneous instructions).[8] *Mullaney*, which states a substantive rule of constitutional law, does not change the established practice for appellate review of jury instructions. *See Mullaney*, *supra* at 690-691, n. 10; *United States* v. *Harrigan*, *supra*; *Hallowell* v. *Keve*, 555 F.2d 103 at 109-111 (3rd Cir. 1977).

Federal court review of state trial jury instructions on collateral attack is governed by similar principles.[9] "[A] single

waiver of any claim of error." *Hankerson*, *supra* at 244, n. 8. The SJC concluded that, "with respect to trials occuring before *Mullaney*, a specific objection to the judge's instructions on burden of proof need not be shown in order to secure appellate review." *Stokes*, *supra* at ____, 374 N.E.2d at 92. After answering the threshold question of the availability of appellate review to a pre-*Mullaney* defendant who did not object to the judge's instructions on burden of proof, the SJC reiterated its belief that "The charge to the jury must be examined in its entirety to determine whether the constitutional requirements have been met." *Stokes*, *supra* at ____, 374 N.E.2d at 93.

[8] There may well be situations where a particular erroneous instruction is so offensive as to require reversal without regard to the remainder of the charge. *See Cupp* v. *Naughton*, 414 U.S. 141 at 147 (1973), citing *Cool* v. *United States*, 409 U.S. 100 (1972). *Cf. United States* v. *Harrigan*, *supra* ("the error was of such a nature that it could not be erased or diminished by the balance of the charge"). As might be surmised, the failure to give an instruction is less problematical, in general, than the giving of an obviously improper instruction. *Henderson* v. *Kibbe*, 431 U.S. 145 at 155 (1977).

[9] I note, however, that "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the

instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughton*, 414 U.S. 141 at 146-147 (1973). *See Dunn* v. *Perrin*, *supra*; *Hallowell* v. *Keve*, *supra*. I will therefore examine the *Gagne* jury charge in its entirety, as did the SJC.

The judge at Gagne's trial first gave the jury general instructions describing their role, the role of the court and the attorneys. He told them that they, and they alone, were the finders of fact; he told them what is and what is not evidence to be considered by them in finding the facts; and he told them, in general terms about inferences "which naturally and reasonably and logically follow[s]" from facts. Tr. at 755. The judge gave the jury general instructions about the credibility of evidence. He then told them about the presumption of innocence and the Commonwealth's burden of proving the defendant's guilt beyond a reasonable doubt. The judge described clearly, accurately and repeatedly that the Commonwealth must prove the defendant's guilt beyond a reasonable doubt. For example, the judge said:

> A defendant need not present any evidence of his innocence, but he may rest inactive and secure until the Commonwealth goes forward with the evidence that proves his guilt.
>
> This presumption of innocence means that a defendant is entitled to have a verdict of not guilty ordered by the Court, unless the evidence is sufficient to warrant a finding by the jury that he is guilty beyond a reasonable doubt.
>
> This presumption of innocence also means that the defendant is entitled to have a verdict of not guilty rendered

constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U.S. 145 at 154 (1977).

> by the jury, unless the evidence actually convinces the jury beyond a reasonable doubt that the defendant is guilty, even though this doesn't result from a presumption of innocence.

Tr. at 765-766. The judge also said:

> In order for a jury to be warranted in finding a defendant guilty in a criminal case, the Commonwealth must prove the guilt of such a defendant beyond a reasonable doubt and likewise must prove beyond a reasonable doubt all the essential elements of the crime with which the defendant is charged.

Tr. at 769-770. The judge then discussed the meaning of proof beyond a reasonable doubt.

After discussing the reasonable doubt standard, the judge turned to the substantive law of homicide. It is the instructions in this part of the charge — specifically instructions regarding the presumption or inference of malice — on which Gagne's *Mullaney* claims focus. The judge told the jury that: "[m]urder is the unlawful killing of a human being with malice aforethought, and if one does it intentionally, that is without mitigation or excuse, taking the life of another human being, he does it maliciously," (Tr. at 779) and that "malice is implied in every deliberately proven act against another . . ." Tr. at 780-781. The judge also told the jury that:

> *Now a killing may be malicious and consequently murder, even though the slayer did not want to cause death.* If a man intentionally and without legal justification or excuse or extenuation uses upon the body of an-

> other a force, for example a bullet from a revolver that is (sic) used will probably do grievous bodily harm to that other person and will create a plain and strong likelihood that the other person would die as a result, the act is malicious within the meaning of the law, *even though the doer of the act was indifferent as to whether death would result or even wished or hoped that death would not result.*

Tr. at 781-782 (emphasis added).[10]

The judge then continued:

> Now, the word malice, therefore, is used in a very technical sense. It not only includes hatred and ill will or revenge, but every other unjustifiable motive. It is a thing done with a malicious mind as when the act has been attended with such circumstances as to carry in them the plain implication of a heart, regardless of social duty, a heart bent upon mischief. It is enough if the killing was intentional and was without legal excuse or justification.
>
> Now, bear in mind, ladies and gentlemen that I'm speaking of murder generally and not the degrees of murder. The condition of mind, which permits one to do injury without excuse or justification, is malice in the contemplation of the law. When the fact of malice is shown there is nothing to rebut the natural presumption of malice for the rational probability is that a man of sound mind intends the probable and natural consequences of his act.

Tr. at 782-783.

[10] The emphasized portion of the quoted instruction was omitted by Gagne from his petition for rehearing. I note that an instruction may have a different meaning if read out of context.

Viewed in the context of the entire charge, the instructions of which Gagne complains[11] do nothing more than *permit* the jury to *infer* the existence of malice from the intentional doing of an unlawful act (in this case the use of deadly force) coupled with the absence of justification (self-defense) or mitigation (heat of passion on sudden provocation).[12] While the judge told the jury that malice could be inferred or presumed[13] from the use of deadly force, he repeatedly told the jury that the burden was on the Commonwealth to prove every element of the crime of murder beyond a reasonable doubt. The judge listed malice as one of those elements and consistently defined malice as requiring the absence of justification or mitigation. The jury could have interpreted these instructions only as permitting an inference of malice from other proven facts, subject to the reasonable doubt standard. Thus, the jury must have concluded from these instructions that although inferences may be drawn and may stand as sufficient by themselves in the absence of contrary evidence; malice in the sense of the nonexistence of justification or mitigation, must be established by the Commonwealth beyond a reasonable doubt. Any confu-

[11] I note that Gagne neither requested an instruction on the burden of proof on the issues of malice or self-defense, nor objected to the charge as given in these respects. Gagne did raise these issues in his motion for a new trial. See n. 7, *supra*.

[12] Inferences or even presumptions, both of which may have the effect of shifting *the burden of production*, are normally permissible. *See generally, Patterson* v. *New York*, *supra* at 230-232 (Powell, J., dissenting). Any such inference or presumption, however, must bear a rational connection with the proved facts on which it is based, *e.g.*, *Tot* v. *United States*, 319 U.S. 463 (1943); *Allen* v. *County Court*, 568 F.2d 998 (2d Cir. 1977), and it must not have the effect of shifting *the burden of persuasion* to the defendant. *Mullaney*, *supra*.

[13] The trial judge apparently used the terms "presumption" and "inference" interchangeably.

sion which the jury might have had when the judge discussed the inference of malice should have been dissipated by the judge's later instructions. For example, the judge, in discussing murder in the first degree, told the jury:

> In order to establish murder in the first degree under this particular section of the statute, *it is not only necessary for the Commonwealth to prove that the killing was done with malice aforethought*, but it must also appear that the act was deliberately premeditated.

Tr. at 784-785 (emphasis added). The judge later said:

> . . . if there isn't any deliberate premeditation, *but there is malice aforethought that's been proved beyond a reasonable doubt*, then you have murder in the second degree.

Tr. at 792 (emphasis added).

The *Gagne* jury charge, viewed in its entirety, shifted to Gagne only *the burden of production* of evidence on the issue of malice. It did not shift to Gagne *the burden of persuasion*. Nothing in *Mullaney* prohibits a state from requiring a defendant to show that there is at least some evidence, whether his or the prosecution's, on factors such as self-defense or heat of passion "before requiring the prosecution to negate this element by proving the absence of [that factor] beyond a reasonable doubt." *Mullaney*, *supra* at 701-702, n. 28. *See Hankerson*, *supra* at 230-231 (Powell, J., dissenting). *See* n. 12, *supra*.

Gagne next contends that there was sufficient evidence of self-defense and heat of passion to raise a reasonable doubt with regard to malice and require the inference to be elimi-

nated from the case. He argues that by permitting the inference to remain, the trial judge relieved the Commonwealth of the burden of proving malice beyond a reasonable doubt and required Gagne to prove justification or mitigation. I disagree. Even if the evidence supportive of Gagne's theory of the case was sufficient to rebut a presumption of malice, it did not concomitantly eliminate the permissible inference of malice:

> . . . although the presumption of a fact may have been dissipated, the permitted inference of that fact is not, thereby, automatically extinguished also. It may, as a survivor, have an independent life of its own. . . . The mere creation of a genuine doubt as to a fact is enough to dissipate the presumption of that fact, but that mere doubt is not enough to foreclose the permitted inference of that fact. The doubt simply places the question in the lap of the fact finder.

Gilbert v. *Maryland*, 36 Md. App. 196 at ____, 373 A. 2d 311 at 317 (1977). The SJC found, however, and I agree, that "[t]he defendant's testimony in rebuttal of the inference of malice was not sufficient to create a reasonable doubt as a matter of law." *Commonwealth* v. *Gagne*, *supra* at 910 (footnote omitted). *See Mullaney*, *supra* at 701-702, n. 28; *Hankerson*, *supra* at 237, n. 3. *See* n. 12, *supra*. Moreover, read fairly, the judge's charge at Gagne's trial did no more than permit the jury to draw rational inferences. In effect, it placed the issue of malice in "the lap of the fact finder." Apparently, the jury chose not to believe Gagne's own testimony as to self-defense and provocation.

I next consider Gagne's contention that the SJC in its decision on his petition for writ of error, *Gagne* v. *Common-*

wealth, *supra*, applied a more lenient constitutional standard than that applied to cases tried after the *Mullaney* decision. Gagne argues that the SJC has created three constitutional standards, one each for cases tried before *Mullaney*, after *Mullaney* but before *Rodriguez*, and after both *Mullaney* and *Rodriguez*. While Gagne does not elaborate on this argument,[14] I am convinced that it is rooted in the SJC's language in *Commonwealth* v. *Stokes*, ____ Mass. ____, 374 N.E.2d 87 (1978), to wit:

> We add that this court will bring greater expectations, and consequently more careful scrutiny of the judge's charge as to these issues, in any case where the trial occurred after the date of *Mullaney*, and particularly after the date of *Rodriguez*.

Commonwealth v. *Stokes*, *supra* at ____ 374 N.E.2d at 93.

I agree with Gagne that the SJC has created a triple standard for review of *Mullaney* claims, but I do not believe that the SJC has created a triple *constitutional* standard. The SJC's footnote to the language quoted above states: "This consideration is a matter of Massachusetts practice. It in no way minimizes our retroactive application of the *Mullaney* requirements themselves." *Id.*, at ____, 374 N.E.2d at 93, n. 4. Apparently, the SJC recognizes that *Hankerson* requires that *Mullaney* be given full retroactive effect.[15] As a matter of

[14] I note particularly Gagne's failure to explain what the three standards he speaks of actually are.

[15] In fact, the SJC applied *Mullaney* retroactively even before the Supreme Court decided *Hankerson*. *E.g.*, *Rodriguez*, *supra*. Furthermore, the SJC has chosen not to hide behind the Supreme Court's *Hankerson* suggestion that a defendant's failure to object to a jury instruction in a pre-*Mullaney* trial may be used to insulate the conviction. *Commonwealth* v. *Stokes*, *supra* at ____, 374 N.E.2d at 92. The SJC said:

> [I]t would be inconsistent to hold on the one hand that a substantive rule of constitutional dimension is completely retroactive and to insist, on the other hand, that defense counsel must have anticipated the rule in the form of an objection or exception before it may be applied retroactively.

Id. *See* n. 7, *supra*.

Massachusetts practice, however, the SJC requires that the Massachusetts courts conduct post-*Mullaney* and especially post-*Rodriguez* trials under a standard even stricter than that imposed by *Mullaney* itself. I know of nothing which prohibits a state from affording its defendants procedural protection greater than that required by the Due Process Clause itself.[16] I therefore reject Gagne's triple-standard argument.

Finally,[17] I consider Gagne's claim that the jury's verdict was against the weight of the evidence. A writ of habeas corpus can be granted for insufficient evidence "only if there is such a void of evidentiary support as to amount to a denial of due process." *Grieco* v. *Meachum*, 533 F.2d 713 at 721 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976). I find no such void here.

For the foregoing reasons, I deny Gagne's petition for a writ of habeas corpus *ad subjiciendum*. An appropriate order shall issue.

FRANK H. FREEDMAN,
United States District Judge

[16] I note in this regard that I believe that the SJC, at least in the context of the case at bar, gave *Mullaney* full retroactive effect in compliance with the *Hankerson* mandate. I also note that policy considerations weigh strongly against requiring a state to apply retroactively its own rule affording greater protection to defendants than the Constitution itself requires.

[17] Any contentions raised by Gagne and not herein discussed are rejected by implication.

Appendix C.

SUPREME JUDICIAL COURT

RICHARD JOSEPH GAGNE *vs.* COMMONWEALTH.

Suffolk. March 7, 1978. — June 19, 1978.

Present: HENNESSEY, C.J., KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Homicide. Malice. Self-Defense. Practice, Criminal, Charge to jury. *Evidence,* Presumptions and burden of proof.

PETITION filed in the Supreme Judicial Court for the county of Suffolk on February 18, 1977.

The case was reserved and reported by *Braucher,* J.

William K. Danaher, Jr., for the plaintiff.

John T. McDonough, Special Assistant District Attorney, for the Commonwealth.

WILKINS, J. In February, 1973, the petitioner (Gagne) was convicted of murder in the second degree. We affirmed the conviction in April, 1975. *Commonwealth* v. *Gagne,* 367 Mass. 519 (1975). Gagne then sought habeas corpus relief in the United States District Court for the District of Massachusetts, where his principal contention was that he was denied due process of law as guaranteed by the Fourteenth Amendment because the trial judge failed to require the Commonwealth to prove malice beyond a reasonable doubt. He relied on *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975), decided on June 9, 1975, whose pendency before the United States Supreme Court we noted in *Commonwealth* v. *Gagne, supra* at 523-524 n.2.

A Federal District Court judge denied Gagne's petition for a writ of habeas corpus, but he did not reach the merits because he concluded that Gagne had not exhausted his State remedies. *Gagne* v. *Meacham,* 423 F. Supp. 1177, 1181 (D. Mass. 1976). The Federal judge concluded that this court should be given an opportunity to consider Gagne's contentions in light of both *Mullaney* v. *Wilbur* and *Commonwealth* v. *Rodriguez,* Mass. (1976) [Mass. Adv. Sh. (1976) 1864], in which we made clear that in the trial of an indictment for murder, where there is some evidence of self-defense, the Commonwealth has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *Id.* at - [Mass. Adv. Sh. (1976) at 1870-1871].

Gagne filed this petition for a writ of error in February, 1977, and a single justice of this court reserved and reported the case for our decision. We conclude that the judgment should be affirmed.

The emphasis of Gagne's challenge to his conviction has changed somewhat since we considered his appeal in 1975. In response to *Mullaney* v. *Wilbur,* Gagne focuses on the judge's charge and claims that the judge placed the burden on him to disprove malice arising from his use of a deadly weapon. Since our decision in *Commonwealth* v. *Gagne, supra,* on several occasions we have considered the application of the principles of *Mullaney* v. *Wilbur.*

In *Commonwealth* v. *Rodriguez, supra* at [Mass. Adv. Sh. (1976) at 1869], noted by the Federal judge (*Gagne* v. *Meacham,* 423 F. Supp. at 1181 n.2), we held that, "when the issue of self-defense is properly before the trier of fact, the Commonwealth must, as matter of due process, prove beyond a reasonable dubt that the defendant did not act in self-defense" (footnote omitted). In that case, we considered the charge as a whole and determined that the judge should have given a requested instruction placing the burden of proving the absence of self-defense on the Commonwealth, and that the charge otherwise was likely to have suggested to the jury "that the defendant had an affirmative burden to prove self-

defense." *Id.* at - [Mass. Adv. Sh. (1976) at 1874-1875]. We concluded by saying that, when a timely request is made in any trial after the date of our decision, an instruction must be given that the Commonwealth bears the burden on the self-defense issue, where the evidence sufficiently raises that issue. *Id.* at [Mass. Adv. Sh. (1976) at 1876]. We did not decide whether there might be circumstances where such a charge must be given even in the absence of a request. *Id.* at n.9 [Mass. Adv. Sh. (1976) at 1876 n.9].

The propriety of the failure of a trial judge to charge the jury concerning the Commonwealth's burden of proof on self-defense, reasonable provocation, and excessive force came before us in *Commonwealth* v. *Stokes*, Mass. (1978) [Mass. Adv. Sh. (1978) 610]. The trial of the *Stokes* case took place before the Supreme Court's decisions in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977) (giving complete retroactive effect to *Mullaney* v. *Wilbur*), our decision in *Commonwealth* v. *Rodriguez*, *supra*, and our decisions in *Commonwealth* v. *Johnson*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 516, 523-524], and *Commonwealth* v. *Greene*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 944, 945-946] (Commonwealth has the burden of disproving provocation where it is an issue). In our *Stokes* opinion, we concluded that we should review the constitutional sufficiency of the judge's charge even in the absence of a request for an instruction on the burden of proof. The same circumstance exists here. Gagne did not request instructions concerning either malice or the burden of proof on the issue of self-defense, nor did he object to the charge in these respects.[1] We proceed, as we did in the *Stokes*

[1] Gagne did raise the issues in his motion for a new trial. The judge denied the motion for a new trial but allowed a request for a ruling that the burden was on "the Commonwealth to prove beyond a reasonable doubt that the Defendant did not act in self-defense and that the homicide was not justified."

case, to determine whether the judge's charge denied Gagne's constitutional rights. As we said in the *Stokes* opinion, "the charge to the jury must be examined in its entirety to determine whether the constitutional requirements have been met." *Id.* at [Mass. Adv. Sh. (1978) at 620].[2]

Gagne argues that the judge instructed the jury that malice was presumed from Gagne's conduct, thus shifting to him the burden of overcoming that presumption. Such a shift of the burden of persuasion would be constitutionally impermissible. *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977). *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). See *Commonwealth* v. *Collins*, Mass. , n.2 (1978) [Mass. Adv. Sh. (1978) 627, 633 n.2]. Gagne claims that the charge given here is similar to the charge considered in the *Mullaney* case as recited in *Wilbur* v. *Robbins*, 349 F. Supp. 149, 151 (D. Me. 1972). The charge considered in *Mullaney* v. *Wilbur*, however, expressly placed on the defendant the burden "to rebut the inference which the law raises from the act of killing." *Wilbur* v. *Robbins*, *supra*. The defendant there had to satisfy the jury "by a fair preponderance of the evidence that . . . he killed in the heat of passion upon sudden provocation." *Id.*[3]

[2] We indicated that as to trials occurring after the *Mullaney* decision, and particularly after our *Rodriguez* decision, we would bring "greater expectations, and consequently more careful scrutiny" to charges on the issues of self-defense and reasonable provocation. Thus, on the same day as the *Stokes* decision, we reversed a conviction where, in a trial occurring after the *Mullaney* decision, but before our *Rodriguez* decision, the judge refused to give a requested instruction placing the burden of proof concerning reasonable provocation on the Commonwealth. *Commonwealth* v. *Collins*, Mass. (1978) (Mass. Adv. Sh. [1978] 627). As will be noted subsequently, the charge in the *Collins* case, in any event, was misleading in a way in which the charge in this case was not.

[3] Current requirements of due process in the placing of burdens of proof in State criminal trials are at best only subtly discernible. Seemingly, a majority of the Justices of the Supreme Court of the United States would find nothing wrong if the Legislature were to eliminate malice as an element of

In this case, on the other hand, nowhere in the charge does the judge expressly place any burden on Gagne to rebut any inference or any presumption, to disprove malice, or to prove justification, excuse, or mitigation. Nor do we see any such burdens placed on Gagne by inference. The judge did not tell the jury that Gagne had the burden to prove or to disprove anything. Repeatedly, the judge defined malice in a variety of words which indicated that malice could be proved only if Gagne's conduct was unaccompanied by "legal justification or excuse or extenuation," was "without mitigation or excuse," or was "without justification, excuse or extenuation." Repeatedly, he also instructed the jury that the burden was on the Commonwealth to prove beyond a reasonable doubt every essential element of the crime charged. One of the essential elements of murder, as he instructed the jury, is malice. As he defined malice as an element of murder, the Commonwealth had the burden of proving beyond a reasonable doubt that Gagne's killing of the victim was intentional and without justification, excuse, or mitigation.

We view the judge's charge in this respect, examined in its entirety, as falling within the language in our *Stokes* opinion describing a constitutionally acceptable charge. "For example, a jury charge might well be constitutionally sufficient which clearly placed the burden of proving malice beyond a

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the crime of murder and were to place on the defendant the burden of proving, as an affirmative defense, for example, that he acted in the heat of passion so as to justify a manslaughter verdict. See *Patterson* v. *New York*, 432 U.S. 197 (1977). The *Patterson* case appears to undercut any broad application of due process principles expressed in *Mullaney* v. *Wilbur*, and arguably may leave *Mullaney* v. *Wilbur* as representing merely a constitutional instruction concerning the drafting of criminal statutes and the definition of common law crimes. See *Patterson* v. *New York*, *supra* at 221-225, where Mr. Justice Powell, the author of *Mullaney* v. *Wilbur*, dissented and criticised as formalistic the distinction between the two cases. See also *Farrell* v. *Czarnetzky*, 566 F. 2d 381, 382-384 (2d Cir. 1977) (Oakes, J., concurring).

reasonable doubt on the Commonwealth and contained other discussion which, although not referring to the burden of proof as to self-defense and reasonable provocation, adequately defined those factors and established them as negating a finding of malice." *Commonwealth* v. *Stokes, supra* at [Mass. Adv. Sh. (1978) at 620].

In this case, there are no extenuating and potentially misleading instructions such as we have seen in other cases. The self-defense language in the charge in *Commonwealth* v. *Rodriguez*, Mass. , - (1976) [Mass. Adv. Sh. (1976) 1864, 1873-1874], is significantly different from that in the charge in this case. The *Rodriguez* charge referred to the defendant as having sought "to justify his action" and to the jury's possible finding that Rodriguez acted in self-defense. In the *Stokes* case, the judge discussed the evidence tending to mitigate a finding of malice, asking whether the evidence was enough to justify a provocation or the use of a deadly weapon. *Id.* at n.5 [Mass. Adv. Sh. (1978) at 621 n.5]. In the *Collins* case, the judge referred to evidence "from which *the defendant seeks to establish that he, if he committed this killing, had justification* — and *he states that in terms of what we call self-defense*" (emphasis in original). *Commonwealth* v. *Collins*, Mass. , (1978) [Mass. Adv. Sh. (1978) 627, 632].

We decline to depart from what we have said concerning the proper treatment of the inference of malice which may be, but need not be, drawn from evidence of the intentional use of a dangerous weapon. *Commonwealth* v. *McInerney*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 1619, 1632-1638]. *Commonwealth* v. *Gagne*, 367 Mass. 519, 522-524 (1975). We have departed of necessity, but as early as *Commonwealth* v. *Gagne*, from the suggestion that a defendant has a burden to rebut an inference of malice which may arise from the use of a deadly weapon. We see no constitutional impediment, however, to a jury instruction that an inference

of malice may be drawn from the fact that a defendant used such a weapon, provided the jury are instructed that the Commonwealth has the burden of proving malice, as properly defined, beyond a reasonable doubt.

It is a common and expected function of triers of fact to draw reasonable inferences from established facts, and it is proper for judges so to instruct jurors. A judge does not violate constitutional principles of due process by advising the jury that, if they think it reasonable, they may infer the existence of malice from the fact, proved beyond a reasonable doubt, that a defendant shot the victim, stabbed him, or otherwise harmed him with a deadly weapon. The judge's charge in this case, read fairly in its entirety, did no more than this. See *Commonwealth* v. *Peters*, Mass. , - (1977) [Mass. Adv. Sh. (1977) 684, 690-691].

Gagne argues next that the testimony of one witness, William R. Roberts, was inherently incredible and that, because that evidence related to malice and contradicted Gagne's explanation of the shooting, he was denied a fair trial. Roberts's credibility was for the jury, and his testimony was not inherently incredible. We need not consider the consequences if that testimony had been inherently incredible.

Finally, Gagne argues that he was denied due process of law because this court misstated certain facts in its opinion in *Commonwealth* v. *Gagne*, *supra* at 526-527. The issue arises in the context of our previous consideration of the question whether, in denying Gagne's motion for a new trial, the judge abused his discretion by declining to order a new trial on the ground that the verdict was against the weight of the evidence. *Id.* at 526. We concluded that there was no abuse of discretion and that there was sufficient evidence to support the verdict, but the opinion misstated two facts. We said that Gagne shot the victim twice and that Gagne had been carrying a gun "for only a few days." *Id.* at 527. The facts are that,

although Gagne shot twice, the victim was apparently struck only once, and it was the victim, not Gagne, who had carried a gun for only a few days. These misstatements do not affect our conclusion and do not constitute a denial of due process of law. The evidence warranted Gagne's conviction, and the trial judge did not abuse his discretion in denying the motion for a new trial.

Judgment affirmed.

COMMONWEALTH vs. RICHARD JOSEPH GAGNE.

Hampden. December 2, 1974. — April 28, 1975.

Present: TAURO, C.J., REARDON, QUIRICO, BRAUCHER, HENNESSEY, KAPLAN, & WILKINS, JJ.

Homicide. Malice. Self-Defense. Practice, Criminal, Charge to jury, New trial.

At a murder trial, where there was evidence that the defendant intentionally fired shots from a revolver which killed the victim, evidence tending to support the defendant's contention that the shooting was in self-defense did not as matter of law rebut or eliminate the inference of malice on his part arising from his use of a deadly weapon, but merely presented a factual issue for the jury. [522-524]

There is a duty to retreat, if possible, before resorting to the use of deadly force in self-defense where one is attacked in his place of business. [524-525]

Although a certain issue could have been, but was not, raised by the defendant at a criminal trial, where he sought to raise it on a motion for a new trial and the judge in his discretion ruled on it, the ruling was open to review on appeal. [525-526]

Although the charge to the jury in a murder case could have been more specific in explaining that excessive force in self-defense or failure to retreat could warrant a finding of only manslaughter, the lack of specificity did not constitute reversible error in the circumstances. [526]

In a murder case where it appeared that the defendant shot and killed the victim at the defendant's place of business after he had closed it one evening and that the defendant relied on self-defense with respect to the shooting, there was, on the record, no merit in a contention by the defendant that a new trial should be granted on the ground that a verdict of guilty of murder in the second degree was against the weight of the evidence. [526-527]

INDICTMENT found and returned in the Superior Court on March 8, 1971.

The case was tried before *Tisdale*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

William K. Danager, Jr. (*Daniel M. Keyes, Jr.*, with him) for the defendant.

John T. McDonough, Assistant District Attorney, for the Commonwealth.

TAURO, C.J. The defendant was convicted of murder in the second degree and appeals pursuant to G. L. c. 278, §§ 33A-33G. He assigns as error (1) the trial judge's failure to direct a verdict on so much of the indictment as charged murder, (2) the judge's refusal to grant a new trial, and (3) the instructions to the jury on malice and self-defense. We find no error and affirm the judgment below.

The evidence at the trial was contradictory, with the following testimony introduced: The defendant was a pharmacist employed in a pharmacy owned by his father. On the night of the homicide, the defendant closed the store at approximately 9 P.M. but remained working in the prescription area in the rear. Sometime after ten o'clock the defendant heard glass break in the front of the store. He drew his revolver, went to the front to investigate, and found a window broken. He opened the door and searched the area outside but was unable to find anyone. He returned to the store and started to call the police when he heard the sound of someone running inside the pharmacy. He saw someone trying to get out the front door who then turned toward the defendant, said "son-of-a-bitch," and pointed a gun in his direction. The defendant took his revolver out of his pocket and fired two shots. The victim fell and the defendant immediately called the police. The defendant was taken to the police station, where he gave a statement disclosing essentially the facts set out above.

It was subsequently revealed that the defendant had known the victim prior to the shooting and had attempted to assist him with some problems the victim

was having with Provincetown authorities regarding his position as a pharmacist there. The victim had attended the pharmacy school where the defendant taught, and in fact had had the defendant as a teacher. Approximately two months before the shooting, the defendant had informed the victim that he could not help him.

In his statement to police, the defendant was very specific as to everything he had done on the night of the shooting. However, the day after the incident, he notified police that he forgot to tell them about a telephone call from Mrs. Helen A. Simkins, with whom he was talking when he heard the glass break, and who held the line open while he made his search. Mrs. Simkins testified in the defendant's behalf.

The defendant also had neglected to tell police in his statement about one Frederick Wasilenko, who the defendant later claimed had come into the store between 10 and 10:20 P.M. to purchase some items. The defendant told police about Wasilenko after the police had been informed by one William R. Roberts that he had seen the defendant and another man conversing in the store between 10:15 and 10:30 P.M. Roberts described the man he had seen in the store, and although Wasilenko, whom he had known for many years, fit the description, Roberts testified that he was certain it was not Wasilenko.

The defendant's testimony at the trial was substantially the same as his prior statement to police, except for the telephone call from Mrs. Simkins and the visit by Wasilenko. There was some inconsistency in the timing of the calls and visits, but otherwise defense witnesses corroborated the defendant's account of the night in question.

The defendant contends that he was surprised by an intruder whose identity was not known to him at the time and upon being faced with a gun he reacted in self-defense by shooting his assailant. The Commonwealth's contention was somewhat different: It contended

that the defendant and the victim had a pre-arranged meeting, something went wrong, and the defendant shot and killed the victim. The case went to the jury with instructions on murder in the first degree, murder in the second degree, and manslaughter, and the jury returned a verdict of guilty of murder in the second degree.

1. The defendant assigns as error the denial of his motion for a directed verdict on so much of the indictment as charged murder. He contends that the Commonwealth failed to make out a prima facie case of murder and that reliance on the presumption of malice was error. We disagree.

It has long been recognized in this Commonwealth that malice may be inferred from the intentional use of a deadly weapon. *Commonwealth* v. *Webster*, 5 Cush. 295, 305 (1850). *Commonwealth* v. *York*, 9 Met. 93, 103 (1845). *Commonwealth* v. *Young*, 326 Mass. 597, 600 (1950). *Commonwealth* v. *Kendrick*, 351 Mass. 203, 209-210 (1966). The existence of malice may be rebutted, however, by showing that the homicide was committed in self-defense and is therefore excusable, or by showing circumstances which, although not justifying the act, would mitigate the crime from murder to manslaughter. *Commonwealth* v. *Kendrick*, *supra*. It does not necessarily follow, however, that where there is *any* evidence of mitigating circumstances, the inference of malice is rebutted. Such a holding would, in effect, require the Commonwealth to prove actual malice in any case where there is any evidence of mitigating or justifying circumstances. This has never been the law of the Commonwealth, and the defendant's reliance on the *York*, *Webster*, and *Kendrick* cases, *supra*, is misplaced.

In the instant case, the Commonwealth's contention was supported by evidence of the defendant's prior relationship with the victim and his having been seen talking to someone who fit the description of the victim immediately before the killing. Additionally, the jury may have disbelieved testimony of the two defense

witnesses, who were not included in the defendant's original statement, as an attempted cover up. Thus, the jury were warranted in finding that the gun was fired intentionally and in inferring malice from the circumstances, as the verdict indicates.

In sum, we cannot agree that the inference of malice was rebutted as matter of law. The jury were not required to believe the defendant or his witnesses. The mere fact that there was some evidence in support of the defendant's theory did not, per se, eliminate the inference of malice. It merely presented a factual issue for resolution by the jury.[1] The burden at all times was on the Commonwealth to prove the defendant guilty beyond a reasonable doubt. The defendant's testimony in rebuttal of the inference of malice was not sufficient to create a reasonable doubt as matter of law.[2] We therefore hold that the trial judge's refusal to direct a verdict on the murder charge was not error.

[1] The Supreme Court of Pennsylvania, in a similar case challenging the "presumption of malice," agreed with the holding we reach here. The court there stated: "Such a presumption does not mean that the jury *must* conclude, upon proof of a felonious homicide, that malice existed, but that, upon such proof being made, and in the absence of extenuating circumstances, a jury is *warranted* in determining that malice has been sufficiently shown to justify a conviction of murder; whether, under all the evidence in the case, malice did in fact exist, is for the jury's ultimate decision." *Commonwealth* v. *Wucherer*, 351 Pa. 305, 311 (1945). Although this case was decided before *In re Winship*, 397 U. S. 358 (1970), which raised the "beyond a reasonable doubt" standard to constitutional dimension, the holding was reaffirmed in *Commonwealth* v. *O'Neal*, 441 Pa. 17 (1970), which postdated the *Winship* case.

Similarly, the Michigan Court of Appeals recognized, as we do here, that we are involved with a "permissible inference rather than a presumption" when discussing malice in this context. *People* v. *Morrin*, 31 Mich. App. 301, 318 (1971). *State* v. *Cuevas*, 53 Hawaii 110 (1971), cited by the defendant, does not indicate a contrary result, as there the court struck down as unconstitutional a *mandatory* presumption of malice. Under our law, the inference of malice is merely permissive, and the issue is ultimately left to the jury for determination.

[2] This is not like *Wilbur* v. *Mullaney*, 496 F. 2d 1303 (1st Cir. 1974), cert. granted 419 U. S. 823 (1974), where arguably the burden was placed on the defendant to prove the elements of mitigation. Here, the prosecution began with, and retained, the burden of proving every element of the offense beyond a reasonable doubt.

2. The defendant contends that the judge erred in charging the jury that the law infers malice from the use of a deadly weapon. The defendant argues that the judge, in doing so, effectively took the case out of the category of manslaughter. After careful review of the charge as a whole, *Commonwealth* v. *Pinnick*, 354 Mass. 13, 15 (1968); *Commonwealth* v. *Benders*, 361 Mass. 704, 708 (1972); *Commonwealth* v. *King*, 366 Mass. 6, 10 (1974), we cannot agree with the defendant's contention. The jury were carefully and properly instructed on both manslaughter and the inference of malice. There was no error.

3. The defendant next argues that the judge erred in charging the jury that the defendant had a duty to retreat before resorting to the use of deadly force. There is no merit to this contention.

Although the defendant recognizes that we follow the rule that a person attacked with deadly force must retreat whenever it is possible to do so in safety, *Commonwealth* v. *Crowley*, 168 Mass. 121, 126 (1897), *Commonwealth* v. *Houston*, 332 Mass. 687, 690 (1955), *Commonwealth* v. *Kendrick*, 351 Mass. 203, 211-212 (1966), he urges us to create an exception where one is attacked in his place of business. See, e.g., *State* v. *Sharpe*, 18 N. C. App. 136 (1973); *Commonwealth* v. *Johnston*, 438 Pa. 485 (1970). See also anno. 41 A. L. R. 3d 584 (1972). In *Commonwealth* v. *Shaffer*, *ante*, 508, 511 (1975), we were asked to adopt a similar exception where one is threatened in his own home. We declined to do so, holding that the location of the assault is just one of the factors, although an important one, to be considered by the jury. See *Commonwealth* v. *Barton*, *ante*, 515, 518,

(1975). The reasoning of the *Shaffer* case applies equally to the instant case.[3] Accordingly, there was no error in the judge's instruction that the right of self-defense does not accrue unless a person has reasonably availed himself of all proper means in his power to avoid the combat.

The defendant argues that even if there is a duty to retreat, the trial judge erred in failing to charge the jury specifically that they should consider that the assault took place in the defendant's place of business. Although we stated in the *Barton* case, *supra*, at 518, fn. 2, that the best procedure is for the judge to explain specifically what factors are to be considered, we cannot say that, taken as a whole, the charge in this case constituted reversible error. The judge instructed the jury to consider all the circumstances in determining whether the defendant was justified in using deadly force. He distinguished between an attack in the home and one on the highway,[4] and left it for the jury to determine what the facts of this case required. In light of all the circumstances, we find no error in the judge's charge.

4. The defendant argues that the judge erred in his charge to the jury because he did not make clear that, if the jury found that the defendant acted in self-defense

[3]See *Commonwealth* v. *DeCaro*, 359 Mass. 388, 390 (1971), where we stated, "The defendant's . . . [contention] that there is no requirement of retreat . . . where the attack occurs at the place of employment of the one attacked, find[s] no support in our law."

[4]In his charge, the judge stated: "I think we all would give different considerations to the matter on the question of self defense if it was in a person's home, as distinguished from where the act was out on a highway, or in the woods, or something like that." Sometime later, in response to a question asked by the jury, the judge stated: "The jury should consider the situation as it looked to him . . .. Consider all that took place, what the defendant had seen and heard there are to be considered as circumstances bearing on the defendant's situation. You are also to consider all that took place where the homicide took place. . . . You should determine the facts — what took place at this pharmacy on this night as it comes to your attention by virtue of the evidence produced in this courtroom."

but went beyond what was necessary in the circumstances, the offense would be manslaughter. Defense counsel did not object to this aspect of the charge at trial, and ordinarily it would not be before us for review. *Commonwealth* v. *Concepcion*, 362 Mass. 653, 654 (1972). However, the defendant, in connection with his motion for a new trial, made a request for a ruling on this question, which request was ruled on and denied by the trial judge. Since the judge exercised his discretion in favor of considering the issue, we may also consider it on review. *Commonwealth* v. *Blondin*, 324 Mass. 564, 566-567 (1949), cert. den. 339 U. S. 984 (1950). We find no error.

In examining the jury charge as a whole, we are convinced that the jury were made aware of all the options available in reaching their verdict. Although the charge could have been more specific in explaining that excessive force or failure to retreat could warrant a finding of manslaughter, the lack of specificity in the instant case, when considered in light of all the circumstances, does not constitute reversible error.

5. The defendant contends that the trial judge erred in denying his motion for a new trial. Such a motion is addressed to the sound discretion of the trial judge, *Commonwealth* v. *Hamilton*, 353 Mass. 746 (1967); *Commonwealth* v. *Breen*, 357 Mass. 441, 448 (1970), and we find no abuse of discretion.

In support of his motion, the defendant argued the points discussed earlier in this opinion. As we have stated, we find no merit in any of these contentions.

Neither is there merit to the defendant's argument that the verdict was against the weight of the evidence. There was sufficient evidence from which the jury could have found that more than an hour after closing the defendant met in his place of business with a person he knew and with whom he had prior dealings. The two conversed, and then as the victim approached the door, he was shot twice with a gun the defendant had been

carrying for only a few days. Although these inferences were not required from the evidence, they were both reasonable and possible. That is all that is necessary. *Commonwealth* v. *Medeiros*, 354 Mass. 193, 197 (1968). *Commonwealth* v. *Lussier*, 364 Mass. 414, 421 (1973). *Commonwealth* v. *Gilbert*, 366 Mass. 18, 29 (1974). *Commonwealth* v. *Montecalvo*, *ante*, 46, 54 (1975). Accordingly, there was no error in the trial judge's refusal to grant a new trial.

6. Pursuant to the requirements of G. L. c. 278, § 33E, we have reviewed the entire transcript and record and have found no reason either to order a new trial or to direct a verdict of a lesser degree of guilt.

Judgment affirmed.

Appendix E.*

The Trial Judge's Charge to the Jury.

The trial judge's charge to the jury with respect to the issues relevant to this appeal can be summarized as follows:

Introductory Part of Charge.

A. Jury told of two great principles of the common law — presumption of innocence and burden of proof (A. 72; Tr. 764).

B. Explanation of the presumption of innocence (A. 73-77; Tr. 765-769).

1. Defendant is entitled to a directed verdict unless the trial judge rules that the evidence is sufficient to warrant a finding by the judge that defendant is guilty beyond a reasonable doubt (A. 73-74; Tr. 765-766).

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*Page references introduced by "A." are to the pagination of the record appendix in the Court of Appeals; those introduced by "Tr." are to the pagination of the original trial transcript.

2. Defendant is entitled to have a verdict of not guilty rendered by a jury unless the evidence actually convinces the jury beyond a reasonable doubt that the defendant is guilty, even though this does not result from a presumption of innocence (A. 74; Tr. 766).

C. Explanation of the burden of proof beyond a reasonable doubt (A. 77-82; Tr. 769-774).

1. Commonwealth must prove all elements of crime beyond a reasonable doubt (A. 78; Tr. 770).

2. The weight of the evidence is what counts (A. 78; Tr. 770).

3. Does not mean beyond all doubt, etc., but does mean proof to moral certainty (A. 78-79; Tr. 770-771).

4. Strong probability of guilt is not enough (A. 79; Tr. 771).

5. Well grounded suspicion is not enough (A. 80; Tr. 772).

6. Again, means proof to a moral certainty (A. 81; Tr. 773).

7. Proof to a moral certainty need not be proof to a mathematical certainty, etc. (A. 81; Tr. 773).

D. Explanation of what facts must be proved beyond a reasonable doubt (A. 82-83; Tr. 774-775).

1. All material facts (A. 82; Tr. 774); "material" explained as "those facts which are essential to the conviction of the defendant . . ." (A. 82; Tr. 774).

2. "If there are other matters of facts which are in issue, between the parties, which, in your judgment, are unimportant or without the proof of which you would be satisfied in reaching your conclusion, then you would be warranted in saying that those facts are not essential and it would not be necessary that they should be established within this degree of proof; namely, proof beyond a reasonable doubt" (A. 82; Tr. 774).

3. "The facts which must be proved by the Commonwealth beyond a reasonable doubt, are those facts which are essential to the conviction of the defendant; collateral issues which are

not important or material on the question of the defendant's guilt do not have to be proved by that degree of proof" (A. 82; Tr. 774).

4. "There is this distinction, which I have just told you before. Facts relied upon by the Commonwealth in proving a case and facts which are necessary to the proof of the case. Not all of the facts relied upon need be proved beyond a reasonable doubt, but all facts essential to the guilt of the defendant must be proved to that degree; namely, to the degree of proof beyond a reasonable doubt" (A. 82-83; Tr. 774-775).

5. "Where the evidence is as consistent with innocence as it is with guilt, the Defendant must, of course, be found not guilty" (A. 83; Tr. 775).

Substantive Part of Charge.

E. Explanation of "murder" (A. 87-100; Tr. 779-792).

1. Murder is "the killing of a human being without legal justification or excuse and without such extenuating circumstances as may reduce the crime to manslaughter, but a killing which is called in the law 'With malice aforethought'" (A. 87; Tr. 779).

2. "Murder is the unlawful killing of a human being with malice aforethought, and if one does it intentionally, that is without mitigation or excuse . . . he does it maliciously. The intention of doing supplies the knowledge" (A. 87; Tr. 779).

3. Malice aforethought is a technical expression coming down from generations and needs explanation (A. 88; Tr. 780).

4. Malice does not necessarily mean ill will or hatred, but it can (A. 88; Tr. 780).

5. "Malice, in law, as used in the expression malice aforethought . . . [means] [a]ny intentional killing . . . without legal justification or excuse, with no extenuating circum-

stances such as heat of blood, anger, [or] passion, sufficient in law to reduce the crime to manslaughter" (A. 88; Tr. 780).

6. Malice includes hatred, resentment, ill will, revenge, and every other unlawful and unjustifiable act or motive. It is intended to denote any actions growing out of a wicked or corrupt motive (A. 88; Tr. 780).

7. "[M]alice is implied in every deliberately proven act against another and a suggestion of the mind, as you know, operates in an almost infinitesimal interval" (A. 88-89; Tr. 780-781).

8. "The purpose is formed and the act accomplishes the purpose. It doesn't linger behind the purpose but may follow close upon the purpose and if the act is unlawful and unjustifiable, it is malicious no matter how suddenly it happened" (A. 89; Tr. 781).

9. "[T]he word aforethought in the expression malice aforethought does not require deliberately premeditated malice or intention to do wrong. If the killing is intentional, though the act follows the thought immediately, without justification, excuse or extenuation, the killing is with malice aforethought within the meaning of that very technical and somewhat misleading expression in the law and it is murder and not manslaughter" (A. 89; Tr. 781).

10. "Now, a killing may be malicious and consequently murder, even though the slayer did not want to cause death. If a man intentionally and without legal justification or excuse or extenuation uses upon the body of another a force, for example a bullet from a revolver that is [*sic*] used will probably do grievous bodily harm to that other person and will create a plain and strong likelihood that the other person would die as a result, the act is malicious within the meaning of the law, even though the doer of the act was indifferent as to whether death would result or even wished or hoped that death would not result" (A. 89-90; Tr. 781-782).

11. "It is enough if the killing was intentional and was without legal excuse or justification" (A. 90; Tr. 782).

12. "Now, bear in mind, Ladies and Gentlemen that I'm speaking of murder generally and not the degrees of murder. The condition of the mind, which permits one to do injury without excuse or justification, is malice in the contemplation of the law. When the fact of malice is shown there is nothing to rebut the natural presumption of malice for the rational probability is that a man of sound mind intends the probable and natural consequences of his act" (A. 90-91; Tr. 782-783).

13. "[I]f I point a gun at one of you at close range, I'd be committing an assault upon you, and more so if the weapon is a dangerous weapon and a gun is . . . a dangerous weapon; an assault can be committed by a person without touching the body of the person assailed . . . and if the person carries out the assault by touching the person, then there has been a battery. . . . So what, in effect, this indictment says is that there was a pointing of a weapon and there was a firing of a weapon and the bullet hitting the deceased was a battery. As a result of that assault and battery Robert Kowalski died" (A. 99; Tr. 791).

F. Explanation of manslaughter (A. 100; Tr. 792-796). There are two kinds of manslaughter:

1. Manslaughter is "the unlawful killing of a human being without malice" (A. 100; Tr. 792).

2. If done "in sudden passion or heat of blood, or caused by reasonable provocation deemed to be adequate in the law, then it becomes manslaughter" (A. 100; Tr. 792).

3. "The characteristic distinction between murder and manslaughter is malice" (A. 101; Tr. 793).

4. "Unless [it is] a sudden combat, there must be some adequate provocation given by the deceased to reduce the crime of killing to manslaughter" (A. 101; Tr. 793).

5. "If the death of the victim, though intended, was inflicted immediately after provocation given by the deceased, which provocation the law deems adequate, to excite sudden and angry passion or create heat of blood, the fact of the malice is rebutted, but the homicide being unlawful is manslaughter" (A. 101; Tr. 793).

6. Quoting *Commonwealth* v. *Webster*, 5 Cush. 295 (1850), at 304, 305: "Manslaughter is the unlawful killing of another without malice and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of a sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life. If death, though willfully intended was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on the deceased's part which the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice but still the homicide being unlawful because a man is bound to curb his passions, is criminal and is manslaughter" (A. 102; Tr. 794).

7. "In considering what is regarded as adequate provocation, it is a subtle rule of law that no provocation by words only, however insulting, will mitigate an intentional homicide as to reduce it to manslaughter. Manslaughter is principally distinguishable from murder in this; that though the act which occasions the death is unlawful, or likely to be attended by bodily mischief, yet the malice, either expressed or implied, which is the very essence of murder, is presumed to be wanting; and, the act being imputed to the infirmity of human

nature, the correction ordained for it is proportionately lenient" (A. 102-103; Tr. 794-795).

8. "Now, what about provocation? Now what provocation will suffice to reduce an intentional killing to manslaughter? The law does not attempt to define in any narrow way the provocation that will reduce the provocation [*sic*] to manslaughter. The rule is that the provocation must be such as would be likely to produce in an ordinary man such a state of passion, anger, fear or nervous excitement, as might lead to an intentional homicide, and moreover, such as did actually produce such a state of mind in the slayer" (A. 103; Tr. 795).

9. "The most common case in which the law recognizes that such a state of mind may be produced, is the case of assault by the deceased upon the slayer or a member of his family" (A. 103-104; Tr. 795-796).

10. "It is not every provocation exciting sudden and angry passion and creating heat of blood that rebuts malice. Passion without adequate provocation is not enough. No words of reproach, however grievous or contemptuous or insulting. however they may intend to enrage the person against whom they are directed — no such words of reproach will be sufficient to reduce a homicide to manslaughter" (A. 104; Tr. 796).

G. Explanation of "self-defense" (A. 106-107; Tr. 798-802): "I have one more general subject to discuss with you" (A. 106: Tr. 798).

1. "[T]he great issue is: did this defendant commit an illegal homicide or was he acting in self-defense?" (A. 106-107: Tr. 798-799).

2. "Now, the general rule on self defense is that a person has no right to defend himself with a dangerous weapon likely to cause serious injury or death to an assailant unless it appears that he is under a reasonable apprehension of great bodily harm and a reasonable belief that no other means would suffice to prevent such harm" (A. 107; Tr. 799).

3. "In addition, the right of self defense does not accrue to a person unless he has availed himself of all proper means in his power to decline the combat" (A. 107; Tr. 799).

4. "If a defendant used a dangerous weapon under circumstances which did not justify its use, or if he exceeds the limits justified by the occasion, he is not entitled to that defense of self defense" (A. 107; Tr. 799).

5. "To put it another way, it is the law that when a person is assailed or assaulted and he, acting under a reasonable apprehension that he is in imminent danger of great bodily harm, and that it is necessary to take action to protect himself from such danger and that there is no other way to escape such potential harm, has the right to protect himself by the use of whatever is necessary, using whatever is appropriate and adequate to protect himself from impending danger, provided, however, that his assailant is upon him, threatening him, or doing acts that endanger his personal safety through serious injury or worse to his person" (A. 107-108; Tr. 799-800).

6. "If he is so assailed and reasonably thought his personal safety was imperiled, he is to be judged by the circumstances existing at such time. If the defendant acted as a person of ordinary prudence, even though he misjudged the potentiality of the circumstances and if, also, he reasonably believed his own person was in danger of serious injury, then the law says that he may protect himself by such means as he may have at hand" (A. 108; Tr. 800).

7. "The foregoing principles of the law of self defense is [*sic*] subject to certain important limitations. Since the right to defend one's person arises from necessity, it stops when necessity ends. In defending himself, a person has no right to use such weapon, a dangerous weapon or such force or violence beyond what, in the honest exercise of his judgment and the existing circumstances . . . [is] actually required for his defense.

"By way of an example: you cannot justify shooting a person because he punched you in the eye or kicked you in the shins. or curses you, or visits upon you some other personal indignity. One expecting to be attacked should first employ whatever means are within his power to avert the necessity of self defense, especially if such defense involves the use of a dangerous weapon such as a loaded pistol or revolver, and until he does so, the right of self defense does not exist. The right of self defense does not become available to a person assaulted until he has availed himself of all reasonable and proper means to decline the combat. And, also, unless it is apparent that the purpose of the assailant is to inflict serious bodily harm and unless the person assaulted has a reasonably well founded apprehension or belief that such was the fact" (A. 108-109; Tr. 800-801).

H. Further explanation of self defense (A. 129-131; Tr 821-823).

1. "When a person is assailed and he, acting under a reasonable apprehension that he is in imminent danger of death or great bodily harm, and that it is necessary for him to strike a blow, that there is no other way to escape, he has the right to protect himself even to the extent of taking the life of his assailant. The person must be assailed. He would not have the right to assume that the deceased intended to assault him, and therefore to give him a fatal blow; there must be some assault upon him at the time, by the deceased, and there must be some overt act by the deceased at the time. With reference to the reasonable apprehension of the defendant, this is to be considered from the standpoint of the defendant at the time of the homicide. The jury should consider the situation as it looked to him, not necessarily as he says now it looked to him, but as it looked to him then. Consider all that took place, what the defendant had seen and heard there are to be considered as circumstances bearing on the defendant's situa-

tion. You are also to consider all that took place where the homicide took place. Place yourselves in the place of the defendant at the time and the place of the fatal blow and determine on all the evidence how it looked to him. By imminent danger is meant immediate danger, such as must be met instantly, and cannot be guarded against by retreat or by calling upon others. By great bodily harm is meant great personal injury. A mere personal indignity, or a mere battery from which great bodily harm cannot reasonably be apprehended will not excuse a person in taking the life of his assailant. It must appear that the defendant had endeavored to avoid any further struggle and retreated as far as he could until there was no probable means of escape; then, and not 'til then, can he kill his assailant. You should determine the facts — what took place at this pharmacy on this night as it comes to your attention by virtue of the evidence produced in this courtroom" (A. 129-131; Tr. 821-823).